

THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

REX – REAL ESTATE EXCHANGE, INC.,

Case No. 2:21-cv-00312-TSZ

Plaintiff,

THE NATIONAL ASSOCIATION OF REALTORS® ANSWER TO AMENDED COMPLAINT, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM

v_a

ZILLOW, INC., et al.

JURY DEMAND

Defendants.

NATIONAL ASSOCIATION OF REALTORS®.

Counterclaim-Plaintiff.

V

REX - REAL ESTATE EXCHANGE, INC

Counterclaim-Defendant

Defendant National Association of REALTORS® (“NAR”) answers the amended complaint of Plaintiff REX – Real Estate Exchange, Inc. (“REX”) as follows, denying all of the headings to the extent they are considered allegations:

RESPONSE TO SPECIFIC ALLEGATIONS

1. NAR admits that REX filed this action against defendants and purported to allege claims under federal and state law. NAR otherwise denies the allegations in Paragraph 1.

I. NATURE OF THE ACTION

8 || 2. NAR denies the allegations in Paragraph 2.

9 ||| 3. NAR denies the allegations in Paragraph 3.

10 || 4. NAR denies the allegations in Paragraph 4.

11 || 5. NAR denies the allegations in Paragraph 5.

12 ||| 6. NAR denies the allegations in Paragraph 6.

13 || 7. NAR denies the allegations in Paragraph 7.

14 || 8. NAR admits that Zillow is a member of s

15 local associations of REALTORS®. NAR otherwise currently lacks knowledge or information
16 sufficient to form a belief about the truth of the allegations in Paragraph 8 and therefore denies them.

17 || 9. NAR denies the allegations in Paragraph 9.

II. THE PARTIES

19 10. NAR currently lacks knowledge or information sufficient to form a belief about the
20 truth of the allegations in Paragraph 10 and therefore denies them.

21 ||| 11. NAR admits the allegations in Paragraph 11.

22 12. NAR currently lacks knowledge or information sufficient to form a belief about the
23 truth of the allegations in Paragraph 12 and therefore denies them.

24 13. NAR currently lacks knowledge or information sufficient to form a belief about the
25 truth of the allegations in Paragraph 13 and therefore denies them.

26 14. NAR currently lacks knowledge or information sufficient to form a belief about the
27 truth of the allegations in Paragraph 14 and therefore denies them.

15. NAR currently lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 15 and therefore denies them.

16. NAR currently lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 16 and therefore denies them.

III. JURISDICTION AND VENUE

6 | 17. NAR denies the allegations in Paragraph 17.

7 18. NAR denies the allegations in Paragraph 18.

8 19. NAR currently lacks knowledge or information sufficient to form a belief about the
9 truth of the allegations in Paragraph 19 concerning the Zillow Defendants and therefore denies them.

10 | NAR denies the remainder of the allegations in Paragraph 19.

11 20. NAR admits that certain NAR members transact business in Washington and in this
12 District. NAR admits that Seattle King County Association of REALTORS® is an association of
13 REALTORS®. NAR denies that it regularly transacts business within Washington and this District.
14 NAR denies the remaining allegations in Paragraph 20.

15 21. NAR currently lacks knowledge or information sufficient to form a belief about the
16 truth of the allegations in Paragraph 21 and therefore denies them.

IV. FACTS

A. Traditional NAR/MLS Residential Real Estate Brokerage Services

19 22. NAR admits that there are brokers, agents, and REALTORS® who provide real estate
20 brokerage services in the United States. NAR admits that some agents work for brokerages, and
21 that some agents are paid commissions for services. NAR admits that REALTORS® are members
22 of the NAR. To the extent the allegations in Paragraph 22 contain legal conclusions, such as those
23 concerning relevant “markets,” NAR denies the allegations. NAR otherwise currently lacks
24 knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph
25 22 and therefore denies them

26 23. NAR admits that it is a trade association with approximately 1.5 million members
27 and that it advocates for the interests of buyers and sellers of residential real estate and for brokers.
28 NAR admits that its members belong to one or more of approximately 1,100 local

1 associations/boards and 54 state and territory associations of REALTORS®. NAR admits that Bob
 2 Goldberg is its CEO. NAR admits that Paragraph 23 includes language quoted from
 3 <https://www.nar.realtor/ceo-update-2017-board-of-directors>. NAR otherwise denies the allegations
 4 in Paragraph 23.

5 24. NAR denies that it “controls” local associations of REALTORS® or multiple listings
 6 services, which are separate business entities that have local discretion with regards to any matters
 7 not mandated by NAR policies. NAR admits that Paragraph 24 includes an image of a map that
 8 appears to be taken from <https://www.nar.realtor/mls-map-of-the-national-association-of-realtors>,
 9 but denies that the image demonstrates NAR’s reach or depicts only multiple listing services that
 10 are owned by local associations of REALTORS®. NAR otherwise denies the allegations in
 11 Paragraph 24.

12 25. NAR denies the allegations in Paragraph 25.

13 26. NAR admits that obtaining a state license to represent consumers as a broker or agent
 14 is not conditioned on membership in NAR or an MLS. NAR otherwise denies the allegations in
 15 Paragraph 26.

16 27. NAR admits that licensed real estate professionals can compete outside the NAR and
 17 MLSs. NAR otherwise denies the allegations in Paragraph 27.

18 28. NAR denies the allegations in Paragraph 28.

19 29. NAR admits that in some real estate transactions brokers or agents are compensated
 20 through commissions, the agent representing the homeowner can be referred to as a “seller agent,”
 21 “listing broker,” or “listing agent,” and that agent places his or her client’s property on one or more
 22 lists of available homes for sale. NAR also admits that in some real estate transactions the agent
 23 representing a client interested in purchasing a home for sale can be referred to as a “buyer agent,”
 24 or “buyer representative.” NAR otherwise denies the allegations in Paragraph 29.

25 30. NAR admits that Statement 7.23 in its Handbook on Multiple Listing Policy
 26 provides, “In filing property with the multiple listing service, participants make blanket unilateral
 27 offers of compensation to the other MLS participants and shall therefore specify on each listing filed

28

1 with the service the compensation being offered by the listing broker to the other MLS participants.”
 2 NAR otherwise denies the allegations in Paragraph 30.

3 31. NAR admits that listing brokers can offer any amount of compensation to buyer
 4 agents under its rules. NAR otherwise currently lacks knowledge or information sufficient to form
 5 a belief about the truth of the allegations in Paragraph 31 and therefore denies them.

6 32. NAR denies the allegations in Paragraph 32.

7 33. NAR denies the allegations in Paragraph 33.

8 34. NAR denies the allegations in Paragraph 34.

9 35. NAR denies the allegations in Paragraph 35.

10 36. NAR denies the allegations in Paragraph 36.

11 37. NAR admits that there are pending federal lawsuits in which private plaintiffs purport
 12 to challenge NAR rules. NAR admits that the United States Department of Justice issued a press
 13 release concerning NAR in 2020. NAR admits that Paragraph 37 contains language from a
 14 complaint filed by the United States. NAR otherwise denies the allegations in Paragraph 37.

15 38. NAR admits that plaintiffs in lawsuits named *Leeder v. NAR*, *Moehrl v. NAR* and
 16 *Sitzer v. NAR* have raised allegations about certain NAR rules. NAR admits that motions to dismiss
 17 were denied in *Moehrl v. NAR* and *Sitzer v. NAR* and that Paragraph 38 quotes language from a
 18 decision relating to one motion to dismiss. NAR otherwise denies the allegations in Paragraph 38.

19 **B. The REX Model**

20 39. NAR currently lacks knowledge or information sufficient to form a belief about the
 21 truth of the allegations in Paragraph 39 and therefore denies them.

22 40. NAR denies the allegations in Paragraph 40.

23 41. NAR denies the allegations in Paragraph 41.

24 42. NAR denies the allegations in Paragraph 42.

25 43. NAR denies the allegations in Paragraph 43.

26 44. NAR denies the allegations in Paragraph 44.

27 45. NAR denies the allegations in Paragraph 45.

1 **C. The Importance Of Internet Aggregator Sites Like Zillow**

2 46. NAR denies that any of its rules are “high-commission strictures.” NAR denies the
 3 existence of a “NAR/MLS cartel.” To the extent the allegations in Paragraph 46 contain legal
 4 conclusions, NAR denies the allegations. NAR otherwise currently lacks knowledge or information
 5 sufficient to form a belief about the truth of the allegations in Paragraph 46 and therefore denies
 6 them.

7 47. NAR admits that some MLSs allow certain listings data to appear on public facing
 8 websites. NAR denies the remainder of the allegations in Paragraph 47.

9 48. NAR admits that consumers can shop for a home without an agent. NAR otherwise
 10 denies the allegations in Paragraph 48.

11 49. NAR currently lacks knowledge or information sufficient to form a belief about the
 12 truth of the allegations in Paragraph 49 and therefore denies them.

13 50. NAR currently lacks knowledge or information sufficient to form a belief about the
 14 truth of the allegations in Paragraph 50 and therefore denies them.

15 51. NAR denies that it considers “internet transparency” to be a competitive threat. NAR
 16 currently lacks knowledge or information sufficient to identify the purported studies referenced in
 17 Paragraph 51 and therefore denies the remaining allegations in Paragraph 51.

18 52. NAR admits that the 2020 NAR Home Buyer and Seller Generational Trends Report
 19 from the National Association of REALTORS® Research Group includes data showing that 52%
 20 of survey respondents found the home they purchased using the internet. NAR otherwise denies
 21 the allegations in Paragraph 52.

22 53. NAR currently lacks knowledge or information sufficient to form a belief about the
 23 truth of the allegations in Paragraph 53 and therefore denies them.

24 54. NAR admits that it has a license agreement with realtor.com. NAR otherwise denies
 25 the allegations in Paragraph 54.

26 55. NAR currently lacks knowledge or information sufficient to form a belief about the
 27 truth of the allegations in Paragraph 55 and therefore denies them.

1 **D. Zillow Agrees To Degrade Non-MLS Listings Upon Joining NAR And MLSs**

2 56. NAR currently lacks knowledge or information sufficient to form a belief about the
3 truth of the allegations in Paragraph 56 and therefore denies them.

4 57. NAR currently lacks knowledge or information sufficient to form a belief about the
5 truth of the allegations in Paragraph 57 and therefore denies them.

6 58. Zillow's 2020 announcement appears to be available at
7 <https://www.youtube.com/watch?v=EMidklRVFMM>. NAR otherwise currently lacks knowledge
8 or information sufficient to form a belief about the truth of the allegations in Paragraph 58 and
9 therefore denies them.

10 59. NAR currently lacks knowledge or information sufficient to form a belief about the
11 truth of the allegations in Paragraph 59 and therefore denies them.

12 60. NAR denies the allegations in Paragraph 60.

13 61. NAR currently lacks knowledge or information sufficient to form a belief about the
14 truth of the allegations in Paragraph 61 and therefore denies them.

15 62. NAR currently lacks knowledge or information sufficient to form a belief about the
16 truth of the allegations in Paragraph 62 and therefore denies them.

17 63. NAR currently lacks knowledge or information sufficient to form a belief about the
18 truth of the allegations in Paragraph 63 and therefore denies them.

19 64. NAR denies that there is no consumer benefit to identifying the source of particular
20 listings on a web display. NAR denies that Zillow's website insulates brokers from competition.
21 NAR otherwise currently lacks knowledge or information sufficient to form a belief about the truth
22 of the allegations in Paragraph 64 and therefore denies them.

23 65. NAR currently lacks knowledge or information sufficient to form a belief about the
24 truth of the allegations in Paragraph 65 and therefore denies them.

25 66. NAR currently lacks knowledge or information sufficient to form a belief about the
26 truth of the allegations in Paragraph 66 and therefore denies them.

27 67. NAR admits that membership in NAR and MLSs are not conditions precedent to
28 becoming an agent and that agents are licensed by states. NAR otherwise currently lacks knowledge

1 or information sufficient to form a belief about the truth of the allegations in Paragraph 67 and
 2 therefore denies them.

3 68. NAR currently lacks knowledge or information sufficient to form a belief about the
 4 truth of the allegations in Paragraph 68 and therefore denies them.

5 69. NAR currently lacks knowledge or information sufficient to form a belief about the
 6 truth of the allegations in Paragraph 69 and therefore denies them.

7 70. NAR denies the allegations in Paragraph 70.

8 **E. Zillow's Compliance with NAR's Rules Was Reviewed and Enforced by NAR's
 9 Multiple Listing Services**

10 71. NAR admits that it is a trade association and that REALTOR® is a registered
 11 collective membership mark that can only be used by real estate professionals who are members of
 12 NAR. NAR's governance policies are set forth in its Constitution and Bylaws, which are available
 13 at https://cdn.nar.realtor/sites/default/files/documents/NAR_2022_Constitution_and_Bylaws.pdf.
 14 NAR otherwise denies the allegations in Paragraph 71.

15 72. NAR admits that all REALTORS® agree to follow NAR's Code of Ethics as a
 16 condition of their membership and that REALTORS® can be subject to potential sanctions when
 17 found to have violated that Code. NAR admits that such sanctions could potentially include
 18 expulsion of an individual from membership with no reinstatement privilege for a specified period
 19 of one (1) to three (3) years, with reinstatement of membership to be by application only after the
 20 specified period of expulsion. Suspension of REALTOR® membership will, in most instances,
 21 have no effect on MLS participatory or user/subscriber privileges, but NAR admits that
 22 REALTOR® principals who belong to an MLS that requires membership in a local REALTOR®
 23 association can have their MLS access cut off if REALTOR® membership is suspended. NAR
 24 otherwise denies the allegations in Paragraph 72.

25 73. NAR admits that it publishes a Handbook on Multiple Listing Policy, which contains
 26 some rules and policies that are mandatory for REALTOR® association-owned MLSs. NAR denies
 27 that any rule or policy in its Handbook on Multiple Listing Policy is called the "mandatory offer of
 28 compensation rule" or "the mandatory co-mingling rule." NAR's Handbook on Multiple Listing

1 Policy is available at <https://www.nar.realtor/handbook-on-multiple-listing-policy>. NAR otherwise
 2 denies the allegations in Paragraph 73.

3 74. NAR denies the allegations in Paragraph 74.

4 75. NAR denies the allegations in Paragraph 75.

5 76. NAR admits the allegations in Paragraph 76.

6 77. NAR admits that it instructs REALTOR® association-owned multiple listing
 7 services to comply with mandatory multiple listing service rules. NAR denies that it instructs its
 8 members to comply non-mandatory rules and otherwise denies the allegations in Paragraph 77.

9 78. NAR admits that REALTOR® association-owned multiple listing services must
 10 conform their governing documents to the mandatory MLS policies established by the National
 11 Association's Board of Directors to ensure continued status as member boards and to ensure
 12 coverage under NAR's master professional liability insurance program. NAR denies that
 13 REALTOR® association-owned multiple listing services must conform their governing documents
 14 to non-mandatory MLS policies established by the National Association's Board of Directors to
 15 ensure continued status as member boards and to ensure coverage under NAR's master professional
 16 liability insurance program. NAR otherwise denies the allegations in Paragraph 78.

17 79. NAR admits that it intends for REALTOR® association-owned multiple listing
 18 services to comply with mandatory polices. NAR denies that it intends for REALTOR®
 19 association-owned multiple listing services to comply with non-mandatory polices and otherwise
 20 denies the allegations in Paragraph 79.

21 80. NAR denies the allegations in Paragraph 80.

22 81. NAR denies the allegations in Paragraph 81.

23 82. NAR currently lacks knowledge or information sufficient to form a belief about the
 24 truth of the allegations in Paragraph 82 about Zillow and therefore denies them. NAR denies the
 25 remaining allegations in Paragraph 82.

26 83. NAR denies the allegations in Paragraph 83.

27 84. NAR currently lacks knowledge or information sufficient to form a belief about the
 28 truth of the allegations in Paragraph 84 and therefore denies them.

1 85. NAR currently lacks knowledge or information sufficient to form a belief about the
 2 truth of the allegations in Paragraph 85 and therefore denies them.

3 86. NAR denies the allegations in Paragraph 86.

4 87. NAR denies the allegations in Paragraph 87.

5 88. NAR currently lacks knowledge or information sufficient to form a belief about the
 6 truth of the allegations in Paragraph 88 about Zillow and therefore denies them. NAR otherwise
 7 denies the allegations in Paragraph 88.

8 **F. The Resulting Harm To Competition**

9 89. NAR denies the allegations in Paragraph 89.

10 90. NAR denies the allegations in Paragraph 90.

11 91. NAR denies the allegations in Paragraph 91.

12 92. NAR denies the allegations in Paragraph 92.

13 93. NAR denies the allegations in Paragraph 93.

14 94. NAR denies the allegations in Paragraph 94.

15 95. NAR denies the allegations in Paragraph 95.

16 96. NAR denies the allegations in Paragraph 96.

17 97. NAR denies the allegations in Paragraph 97.

18 **G. The Root Of The Harm Lies Within NAR/MLS Anticompetitive Rules**

19 98. NAR denies the allegations in Paragraph 98.

20 99. NAR currently lacks knowledge or information sufficient to form a belief about the
 21 truth of the allegations in Paragraph 99 and therefore denies them.

22 100. NAR admits it publishes a Handbook on Multiple Listing Policy, which includes
 23 guidelines for multiple listing services. NAR's Handbook on Multiple Listing Policy is available at
 24 <https://www.nar.realtor/handbook-on-multiple-listing-policy>. NAR denies that any rule addresses
 25 "the clear segregation" of MLS listings. NAR otherwise denies the allegations in Paragraph 100.

26 101. NAR admits that at its 2000 Midyear meeting NAR's Board of Directors approved
 27 refinements to existing policy which authorize MLS participants to display on their websites the
 28 listings of other participants and that this policy is known as NAR's IDX Policy. NAR admits that

1 an IDX feed allows agents who are members of the MLS to have online access to MLS listings and
 2 to make these listings publicly visible on their websites. NAR otherwise denies the allegations in
 3 Paragraph 101.

4 102. NAR admits that its Handbook on Multiple Listing Policy includes policies that
 5 address how IDX data can be used. NAR admits that some optional policies in the Handbook on
 6 Multiple Listing Policy, if adopted by an MLS, would address MLS participants' web displays.
 7 NAR admits that Paragraph 102 includes a quotation from Section 18.3.11 of its Handbook on
 8 Multiple Listing Policy. NAR admits that Section 18.3.11 of its Handbook on Multiple Listing
 9 Policy is an optional policy. NAR admits that Section 18.3.11 of its Handbook on Multiple Listing
 10 Policy appears as an optional policy in model rules other than for an MLS Operated as a Committee
 11 of an Association of Realtors. NAR otherwise denies the allegations in Paragraph 102.

12 103. NAR admits that Bright MLS is one of the larger MLSs in the country. NAR
 13 otherwise currently lacks knowledge or information sufficient to form a belief about the truth of the
 14 allegations in Paragraph 103 and therefore denies them.

15 104. NAR denies the allegations in Paragraph 104.

16 105. NAR currently lacks knowledge or information sufficient to form a belief about the
 17 truth of the allegations in Paragraph 105 and therefore denies them.

18 106. NAR denies that any rule in its Handbook on Multiple Listing Policy requires "the
 19 clear segregation" of MLS listings. NAR otherwise currently lacks knowledge or information
 20 sufficient to form a belief about the truth of the allegations in Paragraph 106 and therefore denies
 21 them.

22 107. NAR denies the allegations in Paragraph 107.

23 **H. The Change In Zillow's Display Is Deceptive And An Illegal Restraint Of Trade**

24 108. NAR denies the allegations in Paragraph 108.

25 109. NAR admits that Bob Goldberg gave the keynote address at NAR's 2017 Leadership
 26 Summit. NAR otherwise denies the allegations in Paragraph 109.

27 110. NAR denies the allegations in Paragraph 110.

1 111. NAR currently lacks knowledge or information sufficient to form a belief about the
 2 truth of the allegations in Paragraph 111 and therefore denies them.

3 112. NAR denies the allegations in Paragraph 112 concerning NAR. NAR otherwise
 4 currently lacks knowledge or information sufficient to form a belief about the truth of the allegations
 5 in Paragraph 112 and therefore denies them.

6 113. NAR denies the allegations in Paragraph 113.

7 114. NAR denies the allegations in Paragraph 114.

8 115. NAR currently lacks knowledge or information sufficient to form a belief about the
 9 truth of the allegations in Paragraph 115 and therefore denies them.

10 116. NAR currently lacks knowledge or information sufficient to form a belief about the
 11 truth of the allegations in Paragraph 116 and therefore denies them.

12 117. NAR currently lacks knowledge or information sufficient to form a belief about the
 13 truth of the allegations in Paragraph 117 and therefore denies them.

14 118. The allegations in Paragraph 118 contain legal conclusions as to which no response
 15 is required. To the extent a response is required, NAR denies the allegations in Paragraph 118.

16 **V. THE RELEVANT MARKETS AND DEFENDANTS' MARKET POWER**

17 119. NAR denies the allegations in Paragraph 119.

18 120. NAR denies the allegations in Paragraph 120.

19 121. NAR denies the allegations in Paragraph 121.

20 122. NAR denies the allegations in Paragraph 122 concerning NAR. NAR otherwise
 21 currently lacks knowledge and information sufficient to form a belief about the truth of the
 22 allegations in Paragraph 122 and therefore denies them.

23 123. NAR denies the allegations in Paragraph 123.

24 **VI. ANTICOMPETITIVE CONDUCT**

25 124. NAR denies the allegations in Paragraph 124.

26 125. NAR denies the allegations in Paragraph 125.

27 126. NAR denies the allegations in Paragraph 126.

VII. ANTICOMPETITIVE EFFECTS

127. NAR denies the allegations in Paragraph 127.

128. NAR currently lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 128 and therefore denies them.

129. NAR currently lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 129 and therefore denies them.

130. NAR denies the allegations in Paragraph 130.

VIII. CLAIMS

**COUNT I - UNREASONABLE RESTRAINT ON TRADE IN VIOLATION OF
SECTION I OF THE SHERMAN ACT, 15 U.S.C. § 1**

131. NAR incorporates by reference its responses to Paragraphs 1-130.

132. NAR admits that the language quoted in Paragraph 132 is contained in Section 1 of the Sherman Act.

133. NAR denies the allegations in Paragraph 133.

134. NAR denies the allegations in Paragraph 134.

135. NAR denies the allegations in Paragraph 135.

136. NAR denies the allegations in Paragraph 136.

137. NAR denies the allegations in Paragraph 137.

138. NAR denies the allegations in Paragraph 138.

139. NAR denies the allegations in Paragraph 139.

140. NAR denies the allegations in Paragraph 140.

141. NAR denies the allegations in Paragraph 141.

**COUNT II – FALSE ADVERTISING IN VIOLATION OF SECTION 1125 OF THE
LANHAM ACT, 15 U.S.C. § 1125 (AGAINST ZILLOW)**

142. Because Count II is not asserted against NAR, no response is required. To the extent a response is required, NAR incorporates by reference its responses to Paragraphs 1-141.

143. Because Count II is not asserted against NAR, no response is required. To the extent a response is required, NAR denies the allegations in Paragraph 143.

1 144. Because Count II is not asserted against NAR, no response is required. To the extent
 2 a response is required, NAR denies the allegations in Paragraph 144.

3 145. Because Count II is not asserted against NAR, no response is required. To the extent
 4 a response is required, NAR denies the allegations in Paragraph 145.

5 146. Because Count II is not asserted against NAR, no response is required. To the extent
 6 a response is required, NAR denies the allegations in Paragraph 146.

7 147. Because Count II is not asserted against NAR, no response is required. To the extent
 8 a response is required, NAR denies the allegations in Paragraph 147.

9 148. Because Count II is not asserted against NAR, no response is required. To the extent
 10 a response is required, NAR denies the allegations in Paragraph 148.

11 149. Because Count II is not asserted against NAR, no response is required. To the extent
 12 a response is required, NAR denies the allegations in Paragraph 149.

13 150. Because Count II is not asserted against NAR, no response is required. To the extent
 14 a response is required, NAR denies the allegations in Paragraph 150.

15 151. Because Count II is not asserted against NAR, no response is required. To the extent
 16 a response is required, NAR denies the allegations in Paragraph 151.

17 152. Because Count II is not asserted against NAR, no response is required. To the extent
 18 a response is required, NAR denies the allegations in Paragraph 152.

19 **COUNT III – FALSE ADVERTISING IN VIOLATION OF SECTION 1125 OF**
 20 **THE LANHAM ACT, 15 U.S.C. § 1125 (AGAINST NAR)**

21 153. Because Count III was dismissed with prejudice by the Court (see ECF 108), no
 22 response is required, and NAR thus denies the allegations in Paragraph 153.

23 154. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 24 response is required, and NAR thus denies the allegations in Paragraph 154.

25 155. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 26 response is required, and NAR thus denies the allegations in Paragraph 155.

27 156. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 28 response is required, and NAR thus denies the allegations in Paragraph 156.

1 157. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 2 response is required, and NAR thus denies the allegations in Paragraph 157.

3 158. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 4 response is required, and NAR thus denies the allegations in Paragraph 158.

5 159. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 6 response is required, and NAR thus denies the allegations in Paragraph 159.

7 160. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 8 response is required, and NAR thus denies the allegations in Paragraph 160.

9 161. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 10 response is required, and NAR thus denies the allegations in Paragraph 161.

11 162. Because Count III was dismissed by the Court with prejudice (see ECF 108), no
 12 response is required, and NAR thus denies the allegations in Paragraph 162.

13 **COUNT IV – UNFAIR OR DECEPTIVE ACT OR PRACTICE VIOLATING RCW**
 14 **19.86.020 OF THE WASHINGTON CONSUMER PROTECTION ACT (AGAINST**
 15 **ZILLOW)**

16 163. Because Count IV is not asserted against NAR, no response is required. To the extent
 17 a response is required, NAR incorporates by reference its responses to Paragraphs 1-162.

18 164. Because Count IV is not asserted against NAR, no response is required. To the extent
 19 a response is required, NAR denies the allegations in Paragraph 164.

20 165. Because Count IV is not asserted against NAR, no response is required. To the extent
 21 a response is required, NAR denies the allegations in Paragraph 165.

22 166. Because Count IV is not asserted against NAR, no response is required. To the extent
 23 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 24 about the truth of the allegations in Paragraph 166 and therefore denies them.

25 167. Because Count IV is not asserted against NAR, no response is required. To the extent
 26 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 27 about the truth of the allegations in Paragraph 167 and therefore denies them.

1 168. Because Count IV is not asserted against NAR, no response is required. To the extent
 2 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 3 about the truth of the allegations in Paragraph 168 and therefore denies them.

4 169. Because Count IV is not asserted against NAR, no response is required. To the extent
 5 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 6 about the truth of the allegations in Paragraph 169 and therefore denies them.

7 170. Because Count IV is not asserted against NAR, no response is required. To the extent
 8 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 9 about the truth of the allegations in Paragraph 170 and therefore denies them.

10 171. Because Count IV is not asserted against NAR, no response is required. To the extent
 11 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 12 about the truth of the allegations in Paragraph 171 and therefore denies them.

13 172. Because Count IV is not asserted against NAR, no response is required. To the extent
 14 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 15 about the truth of the allegations in Paragraph 172 and therefore denies them.

16 173. Because Count IV is not asserted against NAR, no response is required. To the extent
 17 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 18 about the truth of the allegations in Paragraph 173 and therefore denies them.

19 174. Because Count IV is not asserted against NAR, no response is required. To the extent
 20 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 21 about the truth of the allegations in Paragraph 174 and therefore denies them.

22 175. Because Count IV is not asserted against NAR, no response is required. To the extent
 23 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 24 about the truth of the allegations in Paragraph 175 and therefore denies them.

25 176. Because Count IV is not asserted against NAR, no response is required. To the extent
 26 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 27 about the truth of the allegations in Paragraph 176 and therefore denies them.

1 177. Because Count IV is not asserted against NAR, no response is required. To the extent
 2 a response is required, NAR currently lacks knowledge or information sufficient to form a belief
 3 about the truth of the allegations in Paragraph 177 and therefore denies them.

4 178. Because Count IV is not asserted against NAR, no response is required. To the extent
 5 a response is required, NAR denies the allegations in Paragraph 178.

6 **COUNT V – UNFAIR OR DECEPTIVE ACT OR PRACTICE VIOLATING RCW**
 7 **19.86.020 OF THE WASHINGTON CONSUMER PROTECTION ACT (AGAINST**
 8 **NAR)**

9 179. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 10 response is required, and NAR thus denies the allegations in Paragraph 179.

11 180. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 12 response is required, and NAR thus denies the allegations in Paragraph 180.

13 181. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 14 response is required, and NAR thus denies the allegations in Paragraph 181.

15 182. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 16 response is required, and NAR thus denies the allegations in Paragraph 182.

17 183. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 18 response is required, , and NAR thus denies the allegations in Paragraph 183.

19 184. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 20 response is required, and NAR thus denies the allegations in Paragraph 184.

21 185. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 22 response is required, and NAR thus denies the allegations in Paragraph 185.

23 186. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 24 response is required, and NAR thus denies the allegations in Paragraph 186.

25 187. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 26 response is required, and NAR thus denies the allegations in Paragraph 187.

27 188. Because Count V was dismissed by the Court with prejudice (see ECF 108), no
 28 response is required, and NAR thus denies the allegations in Paragraph 188.

1 **COUNT VI – CONSPIRACY TO RESTRAIN TRADE VIOLATING RCW 19.86.030**
 2 **OF THE WASHINGTON CONSUMER PROTECTION ACT**

3 189. NAR incorporates by reference its responses to Paragraphs 1-188.

4 190. NAR admits that the Washington Consumer Protection Act includes the language
 5 quoted in Paragraph 190.

6 191. NAR denies the allegations in Paragraph 191.

7 192. NAR denies the allegations in Paragraph 192.

8 193. NAR denies the allegations in Paragraph 193.

9 194. NAR denies the allegations in Paragraph 194.

10 195. NAR denies the allegations in Paragraph 195.

11 196. NAR denies the allegations in Paragraph 196.

12 197. NAR denies the allegations in Paragraph 197.

13 198. NAR denies the allegations in Paragraph 198.

14 199. NAR denies the allegations in Paragraph 199.

15 200. NAR denies the allegations in Paragraph 200.

16 201. NAR denies the allegations in Paragraph 201.

17 **COUNT VII – DEFAMATION**

18 202. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 19 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 20 no response by NAR is required, and NAR thus denies the allegations in Paragraph 202.

21 203. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 22 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 23 no response by NAR is required, and NAR thus denies the allegations in Paragraph 203.

24 204. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 25 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 26 no response by NAR is required, and NAR thus denies the allegations in Paragraph 204.

27

28

1 205. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 2 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 3 no response by NAR is required, and NAR thus denies the allegations in Paragraph 205.

4 206. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 5 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 6 no response by NAR is required, and NAR thus denies the allegations in Paragraph 206.

7 207. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 8 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 9 no response by NAR is required, and NAR thus denies the allegations in Paragraph 207.

10 208. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 11 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 12 no response by NAR is required, and NAR thus denies the allegations in Paragraph 208.

13 209. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 14 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 15 no response by NAR is required, and NAR thus denies the allegations in Paragraph 209.

16 210. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 17 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 18 no response by NAR is required, and NAR thus denies the allegations in Paragraph 210.

19 211. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 20 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 21 no response by NAR is required, and NAR thus denies the allegations in Paragraph 211.

22 212. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 23 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 24 no response by NAR is required, and NAR thus denies the allegations in Paragraph 212.

25 213. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF
 26 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline,
 27 no response by NAR is required, and NAR thus denies the allegations in Paragraph 213.

214. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline, no response by NAR is required, and NAR thus denies the allegations in Paragraph 214.

215. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline, no response by NAR is required, and NAR thus denies the allegations in Paragraph 215.

216. Because Count VII, as asserted against NAR, was dismissed by the Court (see ECF 108) and REX did not amend its complaint to maintain Count VII by the Court-ordered deadline, no response by NAR is required, and NAR thus denies the allegations in Paragraph 216.

IX. PRAYER FOR RELIEF

The allegations following Paragraph 216 are REX's prayer for relief, to which no response is required. To the extent a response is required, NAR denies any allegations following Paragraph 216 and denies that REX is entitled to any relief.

X. DEMAND FOR JURY TRIAL

REX's demand for a jury trial asserts no allegations and therefore requires no response. NAR demands a jury trial on all issues so triable, pursuant to Federal Rule of Civil Procedure 38.

AFFIRMATIVE DEFENSES

First Defense

REX's claims are barred, in whole or in part, because REX lacks standing to pursue its asserted claims.

Second Defense

The NAR rules identified in REX's amended complaint each have a legitimate business justification.

Third Defense

The NAR rules and NAR conduct identified in REX's amended complaint are lawful, justified, procompetitive, pro-consumer; are carried out in NAR's legitimate business interests; and constitute bona fide competitive activity, the benefits of which outweigh any alleged anticompetitive effects.

Fourth Defense

REX's claims are barred, in whole or in part, because, to the extent any damages do exist, they were caused by REX's failure to mitigate its damages, through co-listing, choosing to advertise on platforms other than Zillow, or otherwise.

COUNTERCLAIM

1 1. Contrary to its marketing, REX is not an innovator. Its marketing and PR campaign
 2 is built on outright falsehoods and statements that—at best—are likely to mislead or confuse
 3 consumers.

5 2. REX claims it was founded to be “the first licensed residential brokerage that uses
 6 AI and big data to push past the outmoded business practices of traditional realtors with the goal of
 7 providing dramatically better outcomes and experiences for both buyers and sellers at a dramatically
 8 lower cost.”

9 3. From its inception, REX has sought to draw a distinction between its services and
 10 those offered by members of NAR by publicly promoting itself as an “innovator” and accusing NAR
 11 and its members of engaging in illegal or unfair conduct.

12 4. Yet, as detailed below, REX is a follower that provides the same types of services as
 13 thousands of other brokerages have long provided before it, and often in ways that are cheaper and
 14 better than REX.

15 5. REX’s marketing is therefore likely to mislead or confuse consumers by falsely
 16 claiming REX’s clients pay no buyer-agent commissions, that its technology is innovative, and that
 17 its seller side commissions are low.

18 6. Instead of accurately marketing its services, REX has attacked NAR with falsities in
 19 an attempt to mislead or confuse consumers into thinking REX is something that it is not.

REX Falsely Claims Its Clients Do Not Pay Buyer-Agent Commissions

21 7. REX maintains a website at www.rexhomes.com, where it publicly advertises its
 22 services to home buyers and sellers.

23 8. On its website, REX claims: “Traditional agents charge 5-6%. Discount brokers,
 24 like Redfin, say they only charge a 1% “listing fee”, but if you read the fine print, you will see it’s
 25 more like 4% total, since sellers also pay the buyer’s agent commission. ***REX charges a low fee by***
 26 ***totally eliminating the buy side agent commission.*** By using data and technology to identify buyers
 27 directly, REX can charge less and make the selling experience a breeze.” Exhibit 1 (emphasis
 28 added).

1 9. In a blog post on its website, REX claims a benefit of its model for home sellers is:
 2 “**No buyer’s agent fee** – This can save you thousands of dollars. *Even if your buyer is working*
 3 *with a non-REX agent, REX doesn’t ask sellers to cover the cost.*” Exhibit 2 (emphasis added)

4 10. In another blog post, REX claims that when a seller chooses to list her home with
 5 REX, “no additional buyer’s agent commission [is] required.” Exhibit 3.

6 11. The blog post continues: “REX’s services cost significantly less when compared with
 7 those of traditional real estate agents,” who are “members of the National Association of Realtors
 8 (NAR).” Exhibit 3.

9 12. In the same blog post, REX claims that NAR’s rules and policies “guarantee[] real
 10 estate agents a certain commission on each transaction while inflating consumer home prices by as
 11 much as \$50 billion per year.” Exhibit 3.

12 13. REX further claims on its website: “By removing the obligation to pay two agent
 13 commissions for a single transaction, [REX] save[s] [its] customers an average of \$10,435 off their
 14 home sales – while also helping them find additional savings on mortgage, escrow, title,
 15 and insurance.” Exhibit 4.

16 14. On the homepage of its website, REX claims: “At REX, you’ve been trusting us to
 17 help buy or sell your home for years. We recognize that opportunity is everywhere, which is why
 18 we’ve decided to begin listing on the MLS — *all while still bypassing traditional agent fees*, saving
 19 you money.” Exhibit 5 (emphasis added).

20 15. Contrary to these claims, sellers who list their homes for sale with REX do in fact
 21 pay buyer-agent commissions.

22 16. In a public interview, REX’s General Counsel, Michael Toth, admitted that home
 23 sellers working with REX “absolutely” pays buyer agent commissions. Exhibit 6.

24 17. In Toth’s own words: “[I]f we have a seller who’s selling a home and there’s an
 25 agent who’s representing the buyer who’s looking for a certain commission and the seller is willing
 26 to pay that commission once it comes up and it’s negotiated, then absolutely with the seller’s wishes
 27 we will represent that seller and pay out that commission at close.” Exhibit 6.

1 18. Moreover, in this litigation, REX’s CEO, Jack Ryan, admitted that REX “assist[s] in
 2 facilitating the payment of a buyer commission by requesting that buyer agents disclose their fee
 3 and that it be negotiated, adjusting the closing price of the house if requested.” ECF 8 ¶ 9.

4 19. REX’s claims about buyer-agent commissions are likely to mislead consumers.

5 20. REX’s advertising boasts, repeatedly and without reservation, that home sellers who
 6 list their homes with REX do not pay buyer-agent commissions.

7 21. REX’s advertisements do not adequately disclose that when a home buyer is
 8 represented by an agent and refuses to pay her agent’s fee out of her own pocket, the home seller
 9 may have to pay some or all of the commission owed to the buyer’s agent to close the sale.

10 22. At best, REX’s business model is premised on offering sellers a discounted
 11 commission, but there is nothing novel or innovative about REX’s approach.

12 23. Beyond REX, there are many other brokerage firms and agents—including members
 13 of NAR—that offer sellers commissions that are below 3%.

14 24. For example, Redfin, a brokerage firm based in Seattle, Washington, which is a
 15 member of NAR, publicly advertises a 1.5% commission for home sellers.

16 25. But Redfin, unlike REX, simultaneously discloses: “Buyer’s agent fee not included,
 17 e.g., if buyer’s agent fee is 2.5%, seller will pay a total fee of 3.5.”

18 *REX Falsey Claims Its Technology Is Innovative and Allows REX to Lower Commissions*

19 26. REX boasts that it has superior technology that, unlike multiple listing services, can
 20 proactively identify the perfect buyer for a seller’s property using artificial intelligence and data
 21 analytics.

22 27. For example, REX’s website states: “Our tech geniuses have come up with
 23 algorithms and computations that use data and AI to find qualified buyers. We then actively market
 24 your home to those buyers across a broad range of targeted channels like Zillow, Trulia, Google,
 25 Facebook, Instagram, Bing, as well as in print. Simply put, we don’t wait for your perfect buyer to
 26 find us. We find them.” Exhibit 1.

27 28. In other public advertisements on its website, REX states:

1 We created REX in 2015 to be the first licensed residential brokerage that uses AI and big
 2 data to push past the outmoded business practices of traditional realtors with the goal of
 3 providing dramatically better outcomes and experiences for both buyers and sellers at a
 4 dramatically lower cost.

5 *Critically, we exist outside what is known as the Multiple Listing Service (MLS) system,*
 6 the loose confederation of realtor organizations that maintain artificially high fees even
 7 though the Internet has radically reduced the value traditional realtors offer to consumers.

8 That sets us apart from other real estate firms that describe themselves as technology-enabled
 9 disrupters ***but remain compliant with the MLS***, a confederation of around 750 realtor
 10 organizations that maintain restrictive practices.

11 Exhibit 7 (emphasis added)

12 29. Later in the same blog post, REX claims:

13 As a technology company, REX started by collecting data from a wide variety of sources –
 14 from census data to purchaser habits at big box retailers – and then organizing it in a secure
 15 cloud environment where it can be easily accessed and studied.

16 Using machine learning, we've built predictive analytics that can target and accurately match
 17 sellers and buyers of properties.

18 *By more efficiently pairing sellers and buyers, we can reduce costs for all involved--REX*
 19 *charges a fixed 2% covering both sides of the transaction instead of the 5-6% customarily*
 20 *enforced by MLS participants.*

21 Exhibit 7 (emphasis added).

22 30. On its website, REX further claims: “REX uses smart, direct and cost-effective
 23 marketing to drive traffic to each listing through proprietary data-driven algorithms. Smarter
 24 marketing enables us to sell homes faster, while avoiding buy-side agent commissions of 2-3%.”

25 Exhibit 8.

26 31. All of these claims made by REX about its technology and its superiority to the
 27 multiple listing service system are false or—at minimum—are likely to mislead consumers.

28 32. Contrary to its marketing that it uses artificial intelligence to market properties
 29 directly to buyers, REX has claimed that its ability to display its listings on Zillow's website, in its
 30 preferred location, is “necessary to compete” and that “without access to aggregators like Zillow,
 31 REX is deprived of a level playing field.” ECF 5 at 10-11.

32 33. According to REX’s CEO, “REX listings’ inclusion on Zillow’s sites has been
 33 critical to REX’s ability to reach consumers directly.” ECF 8 ¶ 19.

1 34. In other words, the viability of REX’s business hinges on its ability to access and use
 2 proprietary technology that was built by one of its putative competitors on the exact terms that it
 3 wants.

4 35. In this litigation, REX also submitted an email, received from one of its customers,
 5 in which the customer wrote, “Wow!!! NO SHOWINGS THIS PAST WEEKEND!! . . . We would
 6 like to get this [property] on MLS ASAP. The REX marketing is not working.” ECF 10, Ex. C.

7 36. If REX’s technology in fact did what it claims—finding buyers using artificial
 8 intelligence outside of the multiple listing service—REX could not claim, as it has in this lawsuit,
 9 that it must have access to Zillow’s website, on the first tab, to compete.

10 37. The foregoing false and misleading claims about REX’s technology have been
 11 specifically promoted by REX to convince consumers that there is something special about REX’s
 12 services that allow it to unlock lower prices without using multiple listing services to find in-market
 13 buyers.

14 38. REX’s CEO has publicly stated:

15 *What happens in the traditional process is you ask to list your home, and someone puts
 16 up a yard sign, and they put it on the MLS.*

17 That’s a very passive activity and most people—most vendors of products—don’t put it on
 a website and say ‘That’s enough. I hope someone checks out this website.’

18 What we do is much more than an agent does because we have PhDs from the best schools
 19 in the country predicting who we think within a certain radius or square mile or demographic
 is the best buyer for your home, and then dropping them a note.

20 Exhibit 9.

21 39. In another public interview, REX’s CEO stated:

22 [W]e find buyers by going to the internet directly, find them on the web directly through
 23 ways of putting out ads. And we see who hits on the ad digitally. Where they live, what
 their demographics are, and we find other people just like those people who may want to see
 this home. So go around the MLS, go around agents, go directly to people on the web.
 24 . . .

25 So most people come to sell their home and then we target people who would like to buy
 26 that home. ***Not using the MLS. not using agents. but just using digital technology to
 27 identify them.*** So we can attach a physical address to an IP address. So we think that if you
 live in this home that you’re a good buyer of this other home, we can drop an ad right into
 your computer to let you know about that home.

28 Exhibit 10.

1 ***REX Falsey Claims NAR Is Anti-Consumer and Engaged in Criminal Conduct***

2 40. Unable to gain traction in the marketplace with its preferred approach—offering fees
 3 that are no lower than its competition and relying on technology built by someone else—REX had
 4 to find someone else to blame for its faults.

5 41. REX has publicly advertised that NAR and its members, including REALTOR®
 6 association-owned multiple listing services, have conspired to suppress competition and artificially
 7 inflate prices.

8 42. For example, REX has advertised that “the National Association of Realtors (NAR),
 9 which represents more than 1.3 million Realtors, has enacted a series of anti-competitive policies –
 10 including making agent commissions non-negotiable to brokers who want to put their listings on the
 11 MLS – to prevent competitors from offering consumers lower transaction fees.” Exhibit 4.

12 43. NAR rules and multiple listing service policies never prohibit negotiations between
 13 the listing broker and a cooperating broker at any time during the transaction.

14 44. Standard of Practice 3-3 from NAR’s Code of Ethics & Standards of Practice
 15 expressly authorizes the listing broker and cooperating broker to come to an agreement to change
 16 cooperative compensation, and that can happen before a property is shown, after showing, or even
 17 after an offer is accepted.

18 45. REX also has publicly claimed that NAR and multiple listing services are engaged
 19 in criminal activity—repeatedly calling them a “cartel.”

20 46. Indeed, notwithstanding the Court’s June 9, 2021 order, in which “[t]he Court
 21 discourage[d] any future use of the term ‘cartel’ to describe Defendants’ conduct, which is neither
 22 persuasive nor remotely accurate,” ECF 80 at 11 n.7, REX has continued to call publicly label NAR
 23 a cartel.

24 47. Less than one month after the Court’s order, on July 1, 2021, REX issued a press
 25 release in which the headline on REX’s website called an investigation a “Probe into NAR Cartel’s
 26 Practices.”

27 48. The body of the piece included a quote from REX’s CEO, who called NAR “the real
 28 estate cartel.” Exhibit 11.

49. As another example, on July 8, 2021, Michael Toth, REX's General Counsel, published an op-ed in the *Wall Street Journal* that was headlined, "Warning to the Real-Estate Cartel." Exhibit 12. REX posted an excerpt from the article to its website on July 9, 2021, under the same headline. Exhibit 13.

50. And on September 15, 2021, REX issued a press release in which Mr. Toth characterized “NAR[’s] . . . business model” as “cartel economics” and called NAR and its members “the real estate cartel.” Exhibit 14.

REX's Campaign of Lies Has Disparaged NAR and Harmed Its Reputation

51. REX's campaign of false claims about its own services, false statements about multiple listing services affiliated with NAR, and false claims about NAR, including those identified above, has deceived consumers.

52. NAR is not a competitor to REX and is not claiming it was injured because it is a competitor to REX.

53. Nevertheless, as a result of REX's false claims, NAR has been harmed.

54. NAR is the owner of the REALTOR® registered collective membership mark, which can only be used by real estate professionals who are members of NAR.

55. NAR publishes the Handbook on Multiple Listing Policy, which includes model enabling provisions for the establishment and operation of a multiple listing services by associations of REALTORS®.

56. The mandatory rules in the Handbook on Multiple Listing Policy establish, among other things, a standard framework for MLS Participants to share listings data, including the information fields to be shared with other brokers to deliver listings via websites, mobile apps, and audio devices.

57. That framework reduces transaction costs by allowing multiple listing services to pool the relevant data about listings in their local area and then syndicate that data to brokers and online portals (like Zillow) so that information can be ingested and easily displayed to the public.

58. Multiple listing services increase competition. Without multiple listing services, there likely would be separate systems of cooperation between buyers and sellers, and their agents.

1 fragmenting property information, and reducing the access buyers and sellers have to each other.
 2 Sellers benefit from multiple listing services by obtaining increased exposure to their property.
 3 Buyers benefit because they can obtain information about all MLS-listed properties while working
 4 with only one broker. This lowers transaction costs, increases competition, and encourages fair
 5 housing. Multiple listing services also level the playing field between brokerages, so that the
 6 smallest brokerage in town has access to almost all of the same inventory as the biggest, multi-state
 7 firm.

8 59. REX's false public advertisements about its own services blame the mandatory rules
 9 in NAR's Handbook and Multiple Listing Policy for what it characterizes as "inflated fees."

10 60. REX's false advertisements are specifically intended to convince consumers to use
 11 REX's services through the false allegation that NAR, through its rules governing multiple listing
 12 services, has artificially inflated commissions, hindered the development of technology for home
 13 listings, and engaged in unlawful or unfair conduct.

14 61. REX has used false statements about its services in attempts to persuade consumers
 15 to use its services instead of those offered by multiple listing services and members of NAR. For
 16 example, in the blog post in which REX claims that, when a seller chooses to list her home with
 17 REX, "no additional buyer's agent commission [is] required," REX goes on to claim that this
 18 differentiates REX's service from NAR members' services. REX claims that its "services cost
 19 significantly less when compared with those of traditional real estate agents," and "[o]ne reason is
 20 that most working real estate agents are members of the National Association of Realtors (NAR)." Exhibit 3. REX also claims that it "poses a direct challenge to the dual commission structure set by
 22 NAR, charging sellers a flat 2-2.5% listing fee without sacrificing any of the services offered to the
 23 buyer or seller." *Id.*

24 62. When consumers are deceived into avoiding multiple listing services they lose the
 25 pro-competitive benefits created by multiple listing services. Sellers lose exposure to the largest
 26 available pool of buyers. Buyers lose access to the largest available pool of properties for sale.

27 63. As a result of REX's false statements, NAR's goodwill and reputation, both with its
 28 own members and consumers, has been harmed.

PARTIES

64. Counterclaim-Plaintiff National Association of REALTORS® is a non-profit corporation under the laws of the State of Illinois with its principal place of business at 430 N Michigan Avenue in the City of Chicago and State of Illinois.

65. Counterclaim-Defendant REX – Real Estate Exchange, Inc. is a Delaware corporation, with its principal place of business at 3300 N Interstate Hwy 35, Suite 149, in the City of Austin and State of Texas.

JURISDICTION AND VENUE

66. This Court has subject matter jurisdiction over NAR's counterclaim under federal law pursuant to 28 U.S.C. §§ 1331 and 1338.

67. Venue for NAR's counterclaim is proper in this district under 28 U.S.C. § 1391(b) and (c)(2) because, among other reasons, having filed its action in this district, REX is subject to personal jurisdiction in this district and also subject to venue in this district.

COUNTERCLAIM COUNT I: FALSE ADVERTISING

(LANHAM ACT 15 U.S.C. § 1125(a))

68. NAR realleges and incorporates by reference the allegations in Paragraphs 1 -67 as if stated herein.

69. REX has, through its false statements about payment of buyer-agent commissions, its statements about its purportedly innovative technology, and its statements about NAR, made false and misleading statements of fact in commercial advertisements about REX's products, services, and commercial activities.

70. REX's conduct is knowing, intentional, and willful. REX intended to, and did in fact, confuse and mislead consumers into believing that sellers who list their homes for sale with REX do not pay buyer-agent commissions; that REX's technology allows it to unlock lower prices for clients without using multiple listing services to find in-market buyers; and that NAR, through its rules governing multiple listing services, has artificially inflated commissions, hindered the development of technology for home listings, and engaged in unlawful or unfair conduct.

71. REX's statements of fact are material and are likely to influence the purchasing decisions of consumers.

72. REX caused its false statements to enter interstate commerce. REX published the false statements on the internet and did so to deceive or mislead consumers in multiple markets and multiple states.

73. As a proximate result of REX's actions, NAR has suffered and is likely to continue to suffer harm to its reputation and a lessening of the goodwill associated with its services and commercial activities. This harm is ongoing. REX continues to harm NAR through false claims that REX offers low commissions and superior technology while NAR has artificially inflated commissions, hindered the development of technology for home listings, and engaged in unlawful or unfair conduct. NAR is entitled to injunctive relief under 15 U.S.C. § 1116(a), permanently restraining REX from making false statements about its services and commercial activities and from making false statements about NAR's services and commercial activities.

74. Under 15 U.S.C. § 1117(a), NAR is entitled to an order requiring REX to account to NAR for any and all profits derived by REX from its actions, and awarding all damages sustained by NAR that were caused by REX's conduct, both to be increased in accordance with the applicable provisions of law.

75. REX's conduct also makes this an exceptional case under 15 U.S.C. § 1117(a), so NAR is entitled to an award of attorneys' fees and costs.

PRAYER FOR RELIEF

Wherefore, NAR requests the following relief:

- a. damages in an amount to be determined at trial;
- b. treble damages, pursuant to 15 U.S.C. § 1117(a);
- c. disgorgement of REX's illicit profits, pursuant to 15 U.S.C. § 1117(a);
- d. injunctive relief, including but not limited to an injunction barring REX's conduct alleged herein;
- e. declaratory relief as alleged herein;
- f. attorneys' fees;

- g. costs; and
- h. such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, NAR demands a jury trial on all issues triable by a jury.

DATED: January 27, 2022

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*Attorneys for Defendant and Counterclaim-
Plaintiff National Association of REALTORS®*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on January 27, 2022, I caused a copy of the foregoing to be filed in this
3 Court's CM/ECF system, which will send notification of such filing to counsel of record.

4 DATED: January 27, 2022

5 */s/ Thomas C. Rubin*

6 Thomas C. Rubin, WSBA #33829